Marriott Corporation *and* Robert Elliott *and* Earle Timmins *and* Keith Watkins. Cases 2–CA–24526–1, 2–CA–24526–2, and 2–CA–24526–3

April 22, 1993

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On November 4, 1992, Administrative Law Judge Howard Edelman issued the attached decision. The General Counsel filed limited exceptions, a supporting brief, and a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.[2]

The General Counsel excepts to the judge's failure to find that the suspensions of employees Earle Timmins, Keith Watkins, and Robert Elliott violated Section 8(a)(3) and (1) of the Act. We find merit in these exceptions.

The judge found, and we agree, that the General Counsel presented a prima facie case that the Respondent suspended and thereafter discharged these three employees in violation of the Act. The judge rejected the Respondent's rebuttal case in regard to the discharges, in which the Respondent attempted to show that the three employees were discharged for leaving the premises without permission. He concluded that the Respondent's discharge of the three employees violated Section 8(a)(3) and (1) of the Act. The judge, however, failed to rule on the Respondent's rebuttal case in regard to the suspensions, which were followed by the discharges and which were precipitated by the same events as those surrounding the discharges. As the General Counsel notes, the Respondent's defenses to the suspensions and discharges were the same. Thus, as the General Counsel further argues, it follows that if the Respondent's defense to the discharges lacked merit, then its defense to the suspensions that preceded the discharges must also fail. We agree. Accordingly, we find, as urged by the General Counsel, that the Respondent's suspensions of the three employees violated Section 8(a)(3) and (1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below, and orders that the Respondent, Marriott Corporation, Palisades, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting employee grievances and promising to remedy such grievances in order to discourage union activities and support.

(b) Promising improved wages and other benefits in order to discourage union activities and support.

(c) Coercively interrogating employees concerning their union activities or sympathies.

(d) Increasing employees' wages, food benefits, uniform benefits or other benefits relating to their wages, hours, or conditions of employment, in order to discourage the employees' activities or support for the Union.

(e) Suspending its employees because of their union activities or support.

(f) Discharging its employees because of their union activities or support.

(g) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to Robert Elliott, Earle Timmins, and Keith Watkins immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

(b) Make the above employees whole for any loss of earnings they may have suffered by reason of the discrimination against them dating from their suspension until their reinstatement as set forth in the remedy section of this decision.

(c) Expunge from the personnel files of Robert Elliott, Earle Timmins, and Keith Watkins any reference to their suspension and discharge and notify them in writing of the expunction.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other

[1] As requested by the General Counsel, we correct the following inadvertent errors which do not affect the results. In the 11th par. of the judge's decision, in regard to a March 1, 1990 meeting between the Respondent's officials and employees, it should read that ''[Employee] Watkins told Respondent officials that the wage increase did *not* meet the cost of living increase.'' Under ''Analysis and Conclusion'' section, 10th par., of the judge's decision, it should read that the ''Respondent violated Section 8(a)(1) of the Act when [General Manager] Keyes stated that if employees *did not go* with the Union, they'd get more than a 50-cent-per-hour raise.''

Finally, we note that the original charges filed in this proceeding on August 3, 1990, alleged that both the suspensions and the discharges of the three discriminatees violated the Act.

[2] We shall modify the recommended Order and notice to conform to the violations found. We shall also order, as requested by the General Counsel, that the Respondent expunge from its records any reference to the suspensions and discharges of the three discriminatees.

records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its place of business at IBM Palisades, New York, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT solicit employee grievances and promise to remedy such grievances in order to discourage union activities and support.

WE WILL NOT promise improved wages and other benefits in order to discourage union activities and support.

WE WILL NOT coercively interrogate employees concerning their union activities or sympathies.

WE WILL NOT increase employees' wages, food benefits, uniform benefits or other benefits relating to their wages, hours, or conditions of employment, in order to discourage the employees' activities or support for the Union.

WE WILL NOT suspend our employees because of their union activities or support.

WE WILL NOT discharge our employees because of their union activities or support.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer to Robert Elliott, Earle Timmins, and Keith Watkins immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

WE WILL make the above employees whole for any loss of earnings they may have suffered by reason of the suspensions and discharges.

WE WILL remove from our files any reference to the suspensions and discharges of Robert Elliott, Earle Timmins, and Keith Watkins, and notify them in writing that this has been done and that the suspensions and discharges will not be used against them in any way.

MARRIOTT CORPORATION

Margit Reiner, Esq., for the General Counsel.
Julienne Bramesco, Esq., Carlton J. Trosclair, Esq., Michael C. Ford, Esq., for the Respondent.
James W. Devor, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on March 20 and 21 and May 20 through 23, 1991, in New York, New York.

On November 29, 1990, a consolidated complaint based on individual charges filed on August 3, 1990, and amended charges filed on November 21, by Robert Elliott, Earle Timmins, and Keith Watkins, individuals, against Marriott Corporation (Respondent), issued alleging that Respondent discharged the above-named Charging Parties because of their membership in, and activities on behalf of Local 30, International Union of Operating Engineers, AFL–CIO (the Union). The complaint also alleges various independent acts in violation of Section 8(a)(1) and (3).

Respondent is a domestic corporation with an office and place of business at IBM Palisades, Route 9, Palisades, New York, where it is engaged in overseeing the food and beverage services and the operation and maintenance of the heating, ventilation, and air conditioning systems at IBM's conference center. In connection with this operation, Respondent annually derives gross revenues in excess of $1 million, and purchases and receives products at this New York facility directly from, enterprises located outside the State of New York, valued at in excess of $50,000. It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Respondent employs at this facility approximately 15 maintenance mechanics, including the above-named Charging Parties. These employees are directly supervised by Gordan Scott-Ramsay an admitted supervisor within the meaning of Section 2(11) of the Act. The general manager of the entire facility is Edward Keyes, also an admitted supervisor within the meaning of the Act.

Sometime in February 1990, the maintenance employees began discussing certain dissatisfactions they had with working conditions, and the possibility of obtaining union representation to remedy such dissatisfaction. Respondent was aware of such activity as early as February 15, when Respondent Night Manager Karen Halsey informed Carolyn Lengers, Respondent's human resource director, that one of the maintenance employees had told her that the men were complaining about their wages, training, the quality of the food and the lack of sufficient work uniforms, and were considering obtaining union representation. Halsey and Lengers reviewed this information with Gene Castellitto, Respondent's then general manager who was succeeded by Keyes. Since Respondent admitted that Keyes was a supervisor within the meaning of the Act, I conclude that Castellitto was similarly a supervisor within the meaning of the Act. Castellitto instructed Lengers to obtain more information concerning the employees' complaints and any union activities.

The following day Lengers met with Greg Sturgis, a supervisor and Ramsay, and reviewed with him the information reviewed with Castellitto. Presumably, pursuant to authorization by Castellitto, Lengers initiated certain changes in the employees' working conditions which were specifically addressed to their complaints. Arrangements were made for hot breakfasts to be served to the employees and on February 21, additional replacement uniforms were ordered.

In the meantime, during this same period, the employees, particularly, Timmins, Elliott, and Watkins engaged in activities on behalf of the Union. Timmins attended a union meeting with other employees at a location outside of Respondent's facility. At this meeting Timmins signed a union card. The next day Timmins distributed union cards to other employees on the job, including Elliott and Watkins. These cards were signed and submitted to the Union.

On or about February 23, a representative from the Union called Castellitto and informed him that a majority of Respondent's employees had signed union cards and demanded recognition. Castellitto then contacted his supervisor, Joseph Sebestyen, Respondent's district manager, and an admitted supervisor within the meaning of the Act, and informed him of the Union's demand.

On March 1, Keyes replaced Castellitto as the general manager and attended a meeting at Respondent's facility. Present was Gorden Ellis, human resource manager from Respondent's home office in Washington, D.C., and an admitted supervisor within the meaning of the Act. Also present were Sebestyen and Keyes. During the course of this meeting Respondent officials spoke about the Union's organizing campaign and the employee concerns described above which led to the employees interest in the Union.

Later that day, following the above meeting, the same Respondent officials met with maintenance employees Watkins, John Henriques, and Jimmy O'Connor. These officials informed the employees that they were aware of their complaints. Although the employees had received recent wage increases pursuant to Respondent's annual wage survey, they were not satisfied with the amount of the increase. Watkins told Respondent officials that the wage increase did meet the cost-of-living increase. Henriques stated that a new wage survey should be made which would include local facilities and commercial buildings. O'Connor stated that they did not have enough uniforms and the employees complained about the food on the evenings and weekends. Food had already been improved since the start of union activities, as a result of employee complaints, by the serving of hot breakfast. Respondent officials told the employees that their complaints would be taken care of.

That same evening Respondent made arrangements to upgrade the food served the employees, and food was upgraded that same evening. As set forth above, Respondent had already ordered additional uniforms, but that evening Keyes ordered additional uniforms over those ordered on February 21.

On March 2, Keyes held an employee meeting with the full compliment of maintenance and engineering employees. Present also for Respondent was Sebestyen, Ellis, and Lengers. Keyes acted as the spokesman. Keyes told the employees that Respondent was aware of the employees' complaints concerning training, uniforms, food, and wages. Keyes told them that he would take care of these complaints to the best of his ability. He told them that the quality of the food had already been improved and that additional uniforms had been ordered, and that Respondent was looking into improving training and reviewing its wage survey. Keyes then asked them why they wanted a union.[1]

On March 2, Respondent received a petition for an election filed by the Union.

Following the petition, the Union held two meetings which were attended by the Charging Parties. Additionally, the Charging Parties were avid union supporters and spoke in favor of the Union to employees in Respondent's facility and in the presence of Respondent's supervisors, especially Ramsay.

On or about March 15, Richard Carver, Respondent's labor relations representative from Respondent's Washington, D.C. office came to the New York facility and met with the employees. During the course of this meeting Carver told the employees that their wages would be increased over and above the original annual wage increase, food would get better, and there would be additional uniforms. Carver then stated that Respondent would listen to employee complaints and do what it could to remedy them.

Several days later, Respondent held another meeting of employees. This meeting was conducted by Keyes. During this meeting Keyes told the employees that Respondent was

[1] Timmins and Watkins credibly testified that Keyes asked the employee about the Union. Keyes denied asking this question. I found Timmins and Watkins to be credible witnesses. Both displayed excellent demeanor and were very forthright in response to questions put to them on both cross and direct examination. Timmins displayed an excellent recollection of facts throughout his testimony. Watkins, at times required leading questions, but my impression was that he was nevertheless telling the truth. Both employees at times willingly admitted to facts which were against their interest. In contrast, as set forth below, Respondent witnesses impressed me as particularly incredible witnesses.

working on getting the employees additional uniforms, improving the food, and working on a new wage survey. In this connection Keyes stated that if the employees rejected the Union, they would get at least a 50-cent-per-hour raise.[2]

Watkins credibly testified that right after this meeting, Scott-Ramsay and Greg Sturgis approached him and Elliott and Scott-Ramsay asked them to give Respondent a chance, and that if they went with Respondent, things would get better. Watkins' testimony was uncontradicted. Shortly after this meeting there was additional improvement in the food, and the employees received additional uniforms. Shortly after these improvements in working conditions took place, Respondent held another employee meeting conducted by Keyes. During the course of this meeting Keyes told the employees about the improvements in the food and clothing and repeated that Respondent's wage survey was still in progress, but that if the employees went with Respondent, their wages would improve.

On April 10, Keyes summoned Timmins to his office. They met alone. Keyes stated that he would deny what was said if it later came to anyone's attention, but he was concerned about the union election, scheduled for April 13, and he wanted to know how Timmins was going to vote. Timmins told Keyes that the Union was best for the workers and would win. Keyes replied that they were both ex-Air Force men and that they should stick together. Timmins repeated that the Union was best for the employees.

On April 12, Keyes summoned Watkins and Elliott into his office and spoke to each individually, and alone. With respect to Watkins, Keyes asked him how he believed the other employees would vote. Watkins replied that he could not speak for the other employees but that he intended to vote for the Union. Keyes said ''Thank you, at least you're honest.'' With respect to Elliott, Keyes asked him how he intended to vote. Elliott responded that it was none of his business and Keyes replied that he respected Elliott for saying that.[3]

The election was held on April 13. The Union lost by a vote of 8 to 7. After the election results were certified, Respondent informed the employees that they would be receiving a wage increase pursuant to their supplemental wage survey. The wage increases were received during the first week in May, retroactive to April 16.

During the month of May the maintenance employees were required to work long hours under heavy pressure in order to ready the center for a big conference that was scheduled to take place during the first week in June. Notwithstanding the admitted difficulty of their job, it was accomplished with Respondent's usual excellence. In this connection, Respondent admits that the Charging Parties were each individually excellent employees with unblemished work records. By June 7 the scheduled conference had concluded and the work pressure had ended.

On June 7, during the lunchbreak, Timmins, Watkins, and Elliott were having lunch with Jean Pearl, an administrative assistant.[4] The conference was over and the people attending were leaving. At some point during the lunchbreak, Watkins, Timmins, and Elliott decided to take some personal time to see Timmins' boat, which was moored nearby. Pearl said they would get in trouble if they left. Either Timmins or Elliott stated that according to Respondent's rules they would get at most a written warning. After lunch, Watkins and Timmins left their beepers in Pearl's office and the three employees went down the hall on their way to leave the building and see Timmins' boat. By sheer coincidence they met Scott-Ramsay who was talking with Bill Diefus, IBM's facilities manager, and Ed Coulter, a site supervisor for IBM's security contractor. Timmins, Watkins, and Elliott credibly testified that on seeing him they asked him if it would be all right to take some personal time to take a quick look at Timmins' boat, and Scott-Ramsay replied they should go ahead, not punch out, hurry back, and not let anyone know. At this point Pearl, who was angry that they were leaving with no one to answer calls, came up to Scott-Ramsay and asked if he were letting them leave. According to the credible testimony of Pearl presently employed as a supervisor by Respondent, and Coulter, a neutral employee, Scott-Ramsay stated that they would be back shortly. Scott-Ramsay testified that the employees told him that they were going to see Timmins' boat and he said ''have a nice day.''

I conclude that based on the mutually credible testimony of Timmins, Elliott, and Watkins and especially the inherently credible testimony of Pearl and Coulter and the virtual admission by Scott-Ramsay, that Scott-Ramsay gave the above-named employees' permission to leave the building to see Timmins' boat without punching out.

It is undisputed that at this time Respondent had issued a memo dated March 3 which set forth that employees had to punch out whenever they left the premises for personal reasons. However, the employees had been told by Jim O'Connor, Greg Sturgis, and Scott-Ramsay, Respondent supervisors, that if they had oral permission from a supervisor they could leave, notwithstanding the memo without punching out. Moreover, Respondent admits that all three employees prior took advantage of this oral permission policy. Respondent admitted that Timmins had received such oral permission on May 15 from Sturgis to buy a car battery and thereafter go to the bank. Similarly, Elliott had received such oral permission on several occasions to keep doctors appointments.

Elliott and Timmins credibly testified that on returning from their visit to the boat, they encountered Sturgis, who

[2] The facts of this meeting are based primarily on the credible testimony of Watkins.

[3] The facts set forth above are based on the credible testimony of the respective Charging Parties. As set forth above, I have concluded each individual to be a credible witness. In connection with Timmins' testimony, Keyes' statement that Timmins should stick with Respondent because he and Timmins were old ex-Air Force men has a ring of truth. Similarly, Elliott's statement that it was none of Keyes' business how he would vote and Keyes' reply has a ring of truth. Moreover, Keyes admitted that he called these three employees into his office and spoke to each one individually. He denied that he asked them how they would vote, but admitted that he asked them if the food was better and he hoped that they would see that he was a man of his word. In view of my very unfavorable impression concerning Keyes' credibility set forth below, and in view of what he admits that he said to the three individuals, and in view of the fact that these employees, most active employees for the Union, were the only employees called in, I do not credit Keyes' denial.

[4] Pearl was not a supervisor employee at the time of the events of June 7 and shortly thereafter. She was promoted to a supervisory position sometime thereafter and was a supervisory employee at the time of this trial.

asked them where they were. They told him and added that they had received permission from Scott-Ramsay. Sturgis checked with Scott-Ramsay who denied that he had given such permission. Sturgis confronted the three employees with Scott-Ramsay's denial but Watkins insisted that Scott-Ramsay had given such permission.

Later that day, at about 4 p.m. the three employees were called into Keyes' office where they met with Keyes, Sebestyen, Lengers, Sturgis, and Scott-Ramsay. Keyes asked the employees where they went, and the employees responded that they had left the premises with Scott-Ramsay's permission to see Timmins' boat. Keyes then informed them that they were suspended until June 12 for leaving the premises without punching out.

Keyes thereafter conducted an investigation. He checked the employee timecards and ascertained that they had not punched out. He spoke to Scott-Ramsay who told him that the three employees encountered him and told him of their intention to see Timmins' boat and he told them to ''have a nice day,'' but that he thought the men were joking. Keyes told him to memorialize this conversation. Keyes then spoke with Pearl who told him that the three employees told her they were going to see Timmins' boat and that she told them they would get in trouble if they left without punching out, but they took the position that at most they would get a written warning. Keyes then testified that he asked Gerard Davidson, a unit employee, but presently working for Respondent as a supervisor, whether Respondent had a practice whereby employees could leave the premises without punching out if they obtained oral permission. However, Davidson denied such conversation.

On June 12 the three employees reported to Respondent's facility and were summoned into Keyes' office one by one and notified by Keyes that they were being terminated for failing to punch out. Both Timmins and Elliott told Keyes that Respondent had an oral policy of not requiring employees to punch out for personal leave if they got oral permission, and that they had followed such policy in the recent past without any problem. Keyes told the employees to get him that information and he would reinvestigate. Both Timmins and Elliott subsequently set forth the instances described above where they were permitted to leave Respondent's premises on obtaining permission and without having to punch out. Several days later the three employees received separate termination notices.

I found Keyes not to be a credible witness. The record established that although Keyes denied making promises to employees after Carver arrived, on March 22, Keyes promised to remedy problems (which he knew existed when he sent Respondent's employees a memo that Respondent was committed to competitive wages and benefits and wanted to know if things were wrong so they could be corrected (G.C. Exh. 7). Further, during cross-examination Keyes was asked what reasons Elliott gave at his unemployment hearing for being terminated and Keyes replied that Elliott said ''he left the property without permission'' when in fact, as Keyes later admitted that Elliott testified that leaving without permission was the reason Respondent gave as the reason for his discharge. Significantly, Keyes denied he was aware of the Union's organization campaign on March 1, the date when Respondent first began its systematic commission of unfair labor practices, notwithstanding that his affidavit indicated he was aware of the Union's campaign on this date. Further, Davidson, a supervisory employee, contradicted Keyes' testimony that he had been asked by Keyes about practice of permitting employees to leave the plant with oral permission only.

On June 15, pursuant to Respondent's ''guarantee of fair treatment'' the three employees met with Sebestyen and Ellis to appeal their termination. Timmins testified that at the meeting he said that it seemed they were fired because of their union activities. Watkins stated that they were wrongfully terminated and that at most they should have received a 1-day suspension and a warning letter. Both employees restated that they had been given permission by Scott-Ramsay to leave without punching out and that if they were wrong, he should take the blame. Ellis and Sebestyen decided that the termination should stand, although they had the authority to rescind it.

Analysis and Conclusion[5]

A. *Solicitation of Grievances and Promises of Benefits*

''It is . . . well established that a solicitation of grievances during an organizational campaign is not, *per se*, a violation. It is only when the there is a promise to remedy those grievances that the violations occur.'' *Mariposa Press*, 273 NLRB 528, 529 (1984), citing *Uarco, Inc.*, 216 NLRB 1, 2 (1974).

There is no question that the Union's organizational campaign had begun prior to March 1, the date of the first solicitation of grievances. The first union meeting had already been held and Catellitto, Keyes' predecessor, had been called by someone who asked for union recognition stating 15 union cards were signed.

The testimony of Respondent's witnesses indicates that Respondent's meetings with its employees on March 1 and 2 were classic cases of violations. On March 1, when Respondent officials told employees that management was trying to understand employees' problems and then enumerated those problems, a clear solicitation of grievances took place. That employees understood it as such is shown by their speaking up and confirming the problems as well as by the statement of one employee that the wage survey should include additional facilities. Keyes' response that he would take care of employee problems and his giving examples of how he would do so, i.e., supplementing the wage survey, sending employees for training, and immediately improving the food quality, was an overt promise to remedy the grievances.

On March 2, in another clear instance of an unlawful solicitation, Keyes stated what he believed employee problems to be. He then asked employees to verify their concerns and state what was bothering them. Again, employees responded to the solicitation and raised their concerns. Keyes' response to the employees was another overt promise to remedy the grievances. He then specifically promised that management would improve food quality immediately, look into training, and review the wage survey. Keyes' solicitations and prom-

[5] The analysis section of this decision sets forth certain testimony, particularly testimony by Respondent's officials related to its defense of the discriminatory discharges alleged, which are not set forth in the Statement of Facts.

ises were reinforced by a written memo sent to employees dated March 22.

During the beginning of April, Keyes engaged in a new solicitation. He testified he called Timmins, Elliott, and Watkins into his office one at a time and asked each of them if the food was better. He then said he hoped they'd see he was a man of his word and followed through on things he said he would do. It can be reasonably inferred that Keyes asking if past grievances had been resolved was an attempt to have employees come forward with new grievances and his statement that he hoped they would see he was a man of his word was a promise to remedy any new grievances they might bring up.

Based on the above, I conclude that on March 1, 2, and in early April, Respondent violated Section 8(a)(1) of the Act by soliciting grievances and promising to remedy them. I also conclude that on March 2 when Keyes specifically promised that Respondent would improve food quality immediately, would look into training, and would review the wage survey, that Respondent, engaged in an unlawful promise of benefits in further violation of Section 8(a)(1).

According to the credible testimony of Timmins and Watkins, when Respondent official Carver met with the employees on March 15, he stated unequivocally that salaries would be increased, food would get better, and employees would get more uniforms. Respondent did not deny such credible testimony.

Carver's promises at this meeting with employees violates the law. These promises were made during the Union's organizational campaign. In fact, Carver was called to Respondent's facility to ''educate'' employees regarding their choice about the Union. Given the timing of the promises and the fact that Carver was a high Respondent official called from Respondent's headquarters, it is evident that his promises were calculated to interfere with employees' Section 7 rights and, thus, under *Fast Food*, I conclude Respondent violated Section 8(a)(1) with regard to Carver's promises at this meeting.

Sometime within a few days after Carver came to Palisades, in mid-March, Keyes held a meeting wherein he said Respondent was working on a wage survey, getting more clothes, and improving the food. Keyes then stated that if employees didn't go with the Union, they'd get more than a 50-cent-per-hour raise.

The promise of increased wages or benefits to dissuade employees from supporting the Union is a violation of Section 8(a)(1) of the Act. Accordingly, I conclude that Respondent violated Section 8(a)(1) of the Act when Keyes stated that if employees went with the Union, they would get more than a 50-cent-per-hour raise.

Watkins credibly testified without contradiction by Respondent, that right after the April meeting with Keyes, Scott-Ramsay, and Sturgis approached him and Elliott and Scott-Ramsay asked them to give Respondent a chance, that if they went with Respondent things would get better.

In *Impact Industries*, 285 NLRB 5 (1987), revd. and remanded on other grounds 874 F.2d 379 (7th Cir. 1988), modified on other grounds 293 NLRB 794 (1989), a supervisor told employees that if they would vote for the company, the president of the company would later help them since employees would help him by their vote for the company. This statement was found to be a violation of Section 8(a)(1) as it was construed to be a promise of undefined benefits in the future if employees voted against the Union. See also *Central Washington Hospital*, 279 NLRB 60 (1986). Thus, I conclude the above statement by Scott-Ramsay is a violation of Section 8(a)(1).

B. *Unlawful Interrogations*

As set forth above in the statement of facts, Timmins, Watkins, and Elliott were each, individually interrogated by Keyes in his office concerning their union activities and how they intended to vote in the upcoming election.

Under *Rossmore House*, 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985), the test for determining whether an interrogation violates the Act is not a per se one, but rather, whether, under the totality of the circumstances, the interrogation restrains, coerces, or interferes with rights under the Act. Some of the areas one must look to are the background, the nature of information sought, the identity of the questioner, and the place and method of interrogation. *Sunnyvale Medical Center*, 277 NLRB 1217 (1985).

The background to Keyes' questioning was one where Respondent had clear union animus as evidenced by the numerous 8(a)(1) violations discussed above. The interrogator, Keyes, was a high official of Respondent, the general manager of the IBM Palisades facility with final responsibility for food and beverage service, groundkeeping, engineering, maintenance, and the front desk. Keyes was the individual who made decisions on discipline from warnings to terminations. The place and method of interrogation were highly coercive. Keyes spoke with the employees one at a time in his office with no one else present. Keyes had no valid reason for questioning the employees and never gave any assurances that no reprisals would be taken against them if they supported the Union.

The fact that Timmins and Watkins admitted they would vote for the Union and Elliott said his vote was none of Keyes' business does not make the questioning less coercive. In *Impact Industries*, supra, questioning of an employee who admitted he would vote for the Union was found to be violative of Section 8(a)(1) as when it occurred in a pervasive atmosphere of unlawful conduct. Similarly, in *Impact*, the questioning of another employee, a known union sympathizer, who told a supervisor that it was none of his business how union meetings were going as found to violate the Act because of the other events found to have taken place and the role of the questioner in the antiunion campaign. In the instant case, too, there was a pervasive atmosphere of unlawful conduct. Further, it was clear that Respondent took the union campaign with the utmost concern as Carver, a high official from Respondent's headquarters, was called to Palisades to lecture the employees about the union campaign. Finally, the interrogator's role in the antiunion campaign is obvious given Keyes' position, his solicitation of grievances, and his illegal promises. Thus, I conclude each of the three interrogations to be a violation of Section 8(a)(1) of the Act.

A. *Unlawful Grant of Benefits*

Respondent admitted in its answer that it improved the quantity and quality of food served at night on or about March 1, and it increased the amount of uniforms issued em-

ployees in or about mid-March. Respondent denied that food on weekends and during the day improved.

Keyes admitted that after the March 1 meeting, he spoke to the food and beverage director about improving the food in the evening and on weekends.

With regard to the food during the day, Timmins, Watkins, and Elliott credibly testified that the food at lunch improved sometime during the period Carver and Keyes were holding meetings, i.e., before the election. Neither Keyes nor any other of Respondent's witnesses ever denied that this occurred.

An increase in benefits timed to turn employees away from the union by increasing their dependency on the employer is a violation of Section 8(a)(1) and (3). *Ideal Elevator Corp.*, 295 NLRB 347 (1989). In *Ideal*, the employer granted raises and medical insurance coverage to employees after a union demanded recognition. These benefits were not granted in accord with preexisting company policy. Similarly, in the instant case, the improvement in food and the increase in uniforms were not in accord with preexisting company policy. These benefits were granted because Respondent realized, as Keyes admitted, that its not acting on employees' concerns initiated their seeking union representation. In fact, as Keyes knew full well, according to his affidavit, there was more than talk, and in fact a union representative had asked Respondent for recognition. Further, prior to employees seeking representation, Respondent never showed any concern about food or uniforms as those topics were not even covered during a district staff meeting on December 14, 1989, although employees had complained about those issues prior to that time.

The granting of improved food and more uniforms, the very problems that employees complained about, were clearly meant to turn employees away from the Union. Accordingly, I conclude that Respondent's improvement in food on weekends, in the evenings, and during the day, as well as the increase in uniforms given employees constitute an unlawful grant of benefits in violation of Section 8(a)(1) and (3).

Respondent has admitted that it granted wage increases to its employees in May. These increases ranged from 74 cents per hour to $2.75 per hour. Respondent's witnesses also admitted that the increases were based not on the annual survey it did in late 1989 but, rather, were based on a new survey compiled at the employees' request and which included types of facilities not included in Respondent's annual survey. The timing of the raises establishes that they were not part of preexisting Respondent policy, but rather were a singular decision to show that Respondent was responsive to employee needs and would act on its numerous illegal promises to better employee wages. Further, the timing tends to establish that such increases were a reward to employees for their negative vote in the union election.

In *NLRB v. Eagle Material Handling*, 558 F.2d 160, 165 (3d Cir. 1977), affg. 224 NLRB 1529 (1976), the court stated that a postelection conferral of benefits violates Section 8(a)(1) if it is a reward to employees for rejecting the union or if it is an inducement to vote against the union in the event of a second election. Accordingly, I conclude Respondent's grant of such wage increase was a violation of Section 8(a)(1) and (3).

D. *The Unlawful Discharges of Timmins, Watkins, and Elliott*

To establish a violation of Section 8(a)(3) of the Act, General Counsel must make a prima facie showing that the discharge was based in whole or in part on union animus, or that the employee's protected conduct was a substantial or motivating factor in Respondent's decision to discharge the employee. Once General Counsel has made a prima facie showing, the burden shifts to the Respondent to demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Accord: *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400–403 (1983).

The union sympathies and activities of Elliott, Timmins, and Watkins are undisputed. Timmins attended three union meetings and signed a card at the first one. After the first meeting, he gave out union cards to his coworkers. Among those signing were Elliott and Watkins. Thereafter, Watkins and Elliott each attended a union meeting. All three frequently spoke of the Union at work.

The union sympathies of Elliott, Timmins, and Watkins were also known to Respondent. Keyes admitted he was aware of Timmins' avid prounion sentiments and further admitted that all employees discussed their feelings openly in front of their supervisors, Scott-Ramsay and Sturgis. Scott-Ramsay and Sturgis never denied this. Further, according to the credible testimony of Timmins and Watkins, when interrogated by Keyes just before the election, both Timmins and Watkins stated they were for the Union.

Respondent's animus is clearly evidenced by the extensive and systematic commission of unfair labor practices, described above. Respondent's animus toward the three discriminatees is evidenced by Keyes' unlawful and individual interrogations of the above three discriminatees. Given the small size of the unit and nature of the individual interrogations, I would conclude Respondent believed the three discriminatees were the most prominent union supporters.

Given the union activity of Elliott, Timmins, and Watkins, Respondent's knowledge of that activity, Respondent's animus toward the Union and toward the three discriminatees in particular, and the timing of the discharges shortly after the first election, General Counsel has established a prima facie case that the three discriminatees were suspended and, 5 days later, fired because of their activity on behalf of the Union.

Respondent's primary defense to its suspension and discharge of the three discriminatees is that they left the premises without permission. Keyes, Ellis, and Lengers all testified that they would not have discharged or recommended discharge of the discriminatees had the three received permission from, Scott-Ramsay. However despite these assertions, the record conclusively establishes based on both the credible testimony of the discriminatees, Pearl, and Respondent's officials admissions that Scott-Ramsay gave the discriminatees such oral permission.

Scott-Ramsay testified that when the three discriminatees said to him they were going to see Timmins' boat, he responded, ''have a nice day.'' Such a statement clearly implies permission especially since following Scott-Ramsay's statement they walked up the stairs toward the loading dock with their coats on. Scott-Ramsay's assertion to Sturgis and

Sebestyen that he did not give the men permission to leave because he felt they were only joking is simply not credible as Sturgis and Sebestyen must have known this given Respondent's investigation of the facts, described above, wherein Pearl corroborated the discriminatees testimony.

Moreover, Scott-Ramsay's superiors, by their own testimony, were very well aware that such permission was granted by Scott-Ramsay.

Scott-Ramsay and Keyes both testified that Scott-Ramsay told Keyes he said to the discriminatees ''have a nice day'' after they said they were going to see Timmins' boat. Keyes' belief that Scott-Ramsay's statement to the three amounted to permission is verified by Keyes' testimony that he believed the discriminatees and didn't believe Scott-Ramsay when he said he didn't grant permission. Sebestyen, testified that he was aware that Scott-Ramsay told the employees to have a nice day. Ellis similarly testified he was aware that Scott-Ramsay said to Pearl as the three employees were leaving, that they would be back soon.

Since it is clear that Respondent was aware that Elliott, Timmins, and Watkins had permission to leave, there must exist another reason for their discharge. The fact that the stated motive is false permits the inference of another motive. More than that, it may be inferred that the motive is one the employer desires to conceal—an unlawful motive—where the surrounding facts tend to reinforce that inference. *Garment Workers*, 295 NLRB 411 (1989); *Aluminum Technical Extrusions*, 274 NLRB 1414, 1418 (1985). In this case Respondent stipulated at trial and the evidence established that Respondent officials were aware of its practice of permitting employees to leave the premises without punching out if they received oral permission from a supervisor. In this connection Supervisor Donalson testified that when Keyes investigated the facts surrounding the subsequent decision to discharge the three discriminatees, he informed Keyes of Respondent's oral permission policy.

Moreover, the evidence established, and Respondent's attorneys admitted at trial, that not only was it aware of such practice but that the discriminatees had taken advantage of such policy in the past without any discipline. Timmins left with oral permission by Sturgis to buy a battery and go to the bank, and Elliott left with oral permission to keep a medical appointment. Respondent's attorneys admit this, but argue without any merit, in my opinion, that its one thing to permit an employee to leave or keep medical appointments and another to permit employees to leave to see another employee's boat. I fail to see a distinction. If Respondent gives oral permission knowing why the employees want to leave, it has determined such reason is legitimate and can hardly justify a discharge when the employees act on such permission. Under these circumstances it is justified to assume the decision to discharge was motivated by unlawful considerations. The Board has held that a discharge for conduct tolerated in the past is a factor which tends to establish unlawful motivation. *Garrison Valley Center*, 277 NLRB 1422 (1985).

The facts also establish that Respondent failed to follow its usual pattern of progressive discipline. Even assuming, contrary to the credible facts in this case, that the discriminatees had left without permission, Respondent engaged in disparate treatment as to its discipline. All three discriminatees were exemplary workers without any prior warnings in the personnel record for any reason. Respondent's disciplinary procedures enumerate these infractions which allow it to fire employees without warning. One of these infractions is unauthorized leaving of the work area. Despite this, Respondent's records establish that Howard Diaz, an employee who abandoned his shift without notifying his supervisor, the identical offense the discriminatees were alleged to have committed, was given a second written warning for that offense. This warning notes Diaz previously committed the same infraction.

The failure to report to work on three consecutive days without adequate justification is another dischargeable offense, nevertheless, Respondent's records establish that Richard Trevorah, an employee who was absent for an entire week without calling, was only given a final warning. The warning indicates that Respondent did not quite believe Trevorah's excuse, but was willing to waive termination based on Trevorah's past performance. When it came to the discriminatees, however, their excellent record did them no good.

Another of the 10 infractions which allow immediate discharge is the willful falsification of company records. Nevertheless, Respondent's records establish that Thomas Grant, an employee who falsified his worksheet, was given a punishment of coaching and counseling, the mildest discipline possible. Thus, the record is clear that, although Respondent could summarily discharge employees for certain offenses, in the past it did not do so but, rather, adhered to its policy of progressive discipline. That practice suddenly changed when the discriminatees were the one alleged to have committed a dischargeable offense.

The fact that a discharge is for conduct tolerated in the past is a factor in showing that union activity is the motivating factor. *Garrison Valley Center*, supra.

During the course of this trial, Respondent counsel contended that permission *would not have been granted* to the discriminatee to see a boat, although permission was granted in the past for the discriminatees to go to the bank or to keep medical appointments. During the trial, before all the evidence was in I stated that there was a difference in giving such permission for need, as against recreation purposes. However, after all the evidence was in, and after reviewing the entire record and briefs, it is clear that Respondent, through Scott-Ramsay did give such permission, and that Respondent's highest officials were aware of such permission prior to Respondent's decision to discharge the employees. Moreover, a careful examination of the violations that were condoned by Respondent does indeed establish disparate treatment by Respondent.

Finally, during the course of this trial, Respondent's highest officials when pressed about the apparent inconsistencies as to the reasons for the discharges, testified incredibly that notwithstanding the discriminatees obtaining permission, Respondent's past practice of permitting employees to leave the premises with oral permission, including the discriminatees, on other occasions, prior to their union activity and its disparate treatment directed to the discriminatees concerning Respondent's written policy relating to dischargeable offenses, that the discriminatees were discharged because they *had intended* to leave without asking permission. In other words, Respondent contends that the discriminatees were discharged because Respondent speculatively concluded that the employees would have left without permission if Scott-

Ramsay had not given them permission. In this connection when asked why Respondent took drastic action of firing three good workers, Keyes said it was because the three were blatantly planning to leave the premises. Sebestyen testified that when he reviewed the discharge, he did not do his normal review of the employees' personnel records because of the blatancy of the discriminatees' intention. Ellis, too, said that part of his decision was based on the three discussing leaving prior to doing so, and discussing the kind of punishment they might get.

Respondent's stress on the employees' alleged discussion with Pearl prior to leaving amounts to punishment based on intent. Even assuming, arguendo, that the employees were ''talking big'' to Pearl about what they would do, the Respondent's stress on intent, rather than actuality, points toward the conclusion that Respondent discharged them for a discriminatory motive. To allow such a defense would lead to an Orwellian world where people are punished for what they think rather than what they do. Where an employer is unable to settle on a reason for discharge but vacillates among several asserted reasons, there is an inference that the real reason for the discharge is a discriminatory reason. *Steven Aloi Ford*, 179 NLRB 229 (1969).

In my opinion, Respondent has utterly failed to satisfy its *Wright Line* burden. Rather, Respondent's defense conclusively establishes General Counsel's case. Accordingly, I conclude that Timmins, Elliott, and Watkins were terminated by Respondent entirely for their union activities and such discharge was in violation of Section 8(a)(1) and (3).

Respondent's 10(b) Contention

Respondent contends that the amendments filed on November 21, 1990, to the initial charges filed on August 3, 1990, by the individual discriminatees are barred by Section 10(b). The initial charges filed by the discriminatees on August 3 alleged only the unlawful suspensions. Following the investigation of these charges, the discriminatees, on November 21, 1990, filed amended charges which alleged the 8(a)(1) and (3) violations which took place in March and April 1990 and are set forth and discussed above. It is clear that the amended charges involve the Respondent's animus toward the Union generally, and toward discriminatee specifically, as the most active union employees. The individual acts which establish Respondent's animus, its promises of benefits, grant of benefits, unlawful interrogations, also constitute individual acts in violation of Section 8(a)(1) and (3) as set forth and discussed above.

Nickles Bakery of Indiana, 296 NLRB 927 (1989), holds that 8(a)(1) complaint allegations must be closely related to the allegations or subject matter set forth as the basis for the underlying charge. *Nickles* set forth several areas of inquiry in order to determine if allegations are closely related. These areas are: (1) whether the allegations involve the same legal theory; (2) whether they arise from the same factual circumstances or sequence of events; and (3) whether respondent would raise similar defenses to the allegations.

Regarding the first area of inquiry noted above, the legal theory regarding the discharges and that regarding the other violations alleged is the same, i.e., an illegal response by Respondent to a unionization campaign and an attempt to preclude any postelection union activity. Where the complaint and charges involve acts that are part of the employer's overall plan to resist employees' unionization, the allegations in the complaint have been found not to be barred by Section 10(b) though they were not alleged in the charge. *Jennie-O Foods*, 301 NLRB 305 (1991). With regard to the second criterion set forth in *Nickles*, all violations arise out of the same factual circumstances, i.e., the union campaign. All violations enabled Respondent to undermine union support in the first and any subsequent elections and were part of the same sequence of events. Where the same course of conduct is involved in the charge and in the complaint, the matters alleged in the complaint have been found to be timely. *Helnick Corp.*, 301 NLRB 128 (1991). Finally, Respondent either offered no defenses to the 8(a)(1) and (3) allegations or stated that they did not occur.

Conclusions of Law

1. Respondent is, and has been, at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is, and has been, at all times material, a labor organization within the meaning of Section 2(5) of the Act.

3. By soliciting employee grievances and promising to remedy such grievances, to discourage union activity and support Respondent has violated Section 8(a)(1) of the Act.

4. By promising improved wages and other benefits to discourage employee support for the Union, Respondent has violated Section 8(a)(1) of the Act.

5. By interrogating their employees concerning their union activities and sympathies, Respondent violated Section 8(a)(1) of the Act.

6. By increasing employees wages, food benefits, and uniform allowance in order to discourage such employees union activities or support for the Union, Respondent violated Section 8(a)(1) and (3) of the Act.

7. By discharging its employees Robert Elliott, Earle Timmins, and Keith Watkins, Respondent violated Section 8(a)(1) and (3) of the Act.

Remedy

It having heen found that the Respondent has engaged in certain unfair labor practices, it is recommended that it cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act.

Since I have found that Respondent discriminatorily discharged its employees Elliott, Timmins, and Watkins, I shall recommend Respondent make whole said employees together with interest as set forth below, from the date of their termination until their reinstatement or valid offer of reinstatement.

Backpay for the above employees shall be computed in accordance with the formula approved in *F. W. Woolworth Co.*, 90 NLRB 289 (1950). Interest on and after January 9, 1990, shall be computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment 26 U.S.C. § 6621 in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621, shall be computed as set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977)).

I shall also recommend that Respondent expunge from its records any reference to the discharges of the above-named employees, and to provide written notice of such expunction to those employees, and to inform them that Respondent's unlawful conduct will not be used as personnel action concerning them. *Sterling Sugars*, 261 NLRB 472 (1982).

[Recommended Order omitted from publication.]